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CHIROPRACTIC ETHICS AND BOUNDARIES

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INTRODUCTION

All professional practitioners have ethical requirements, and chiropractors are no exception. In particular, chiropractors have a special caregiver-to-patient relationship that requires the patient to place a significant amount of trust in his/her chiropractor. As such, ethics and boundaries are extremely important to maintain the unique relationship, as well as the trust of all patients—and the public—in you and your profession.

The information in this presentation is by no means exhaustive, nor does it aim to answer any specific instance of conduct. Ethics issues frequently are not very clear. If you have concerns about a specific case, you should seek advice before acting. However, knowing the applicable law and rules is always a good place to start.

COMMON ETHICAL & BOUNDARY COMPLAINTS

What constitutes a violation can be hard to pinpoint when it is not obvious and egregious, like sexual misconduct. Many state licensing boards have a category called "unprofessional conduct" which represents about one-half of all complaints. Gina Shaw, *Avoid Common State Board Violations*, ACA NEWS, Sep. 2010 (*available at* http://www.acatoday.org/content_css.cfm?CID=2791). This includes neglect, patient abuse, practicing beyond the scope, failure to maintain records, breach of confidentiality, sexual misconduct, nonsexual dual relationship or boundary violation, and patient abandonment. *Id*. The Minnesota Board of Chiropractic Examiners has eight "unprofessional" categories, including: (1) unprofessional conduct, (2) unethical or deceptive practices, (3) sexual misconduct, (4) providing unnecessary services, (5) charging unconscionable fees, (6) threatening or dishonest fee collection, (7) fraud on patients or insurance, and (8) waiving deductible or co-pay.

Perhaps surprisingly, nationally, the second most common violation is felonies—which do not necessary have anything to do with the practice of chiropractic. Shaw, *supra*. The third most common violation nationally is advertising (false advertising, failure to follow state rules, etc.). *Id*.

An important note to bear in mind comes from Dr. Oliver Smith, D.C., the former president of the Federation of Chiropractic Licensing Boards: "While we have trusted employees, and we assume that they're billing the way we've directed them to, the doctor remains responsible for what happens in the office." *Id*.

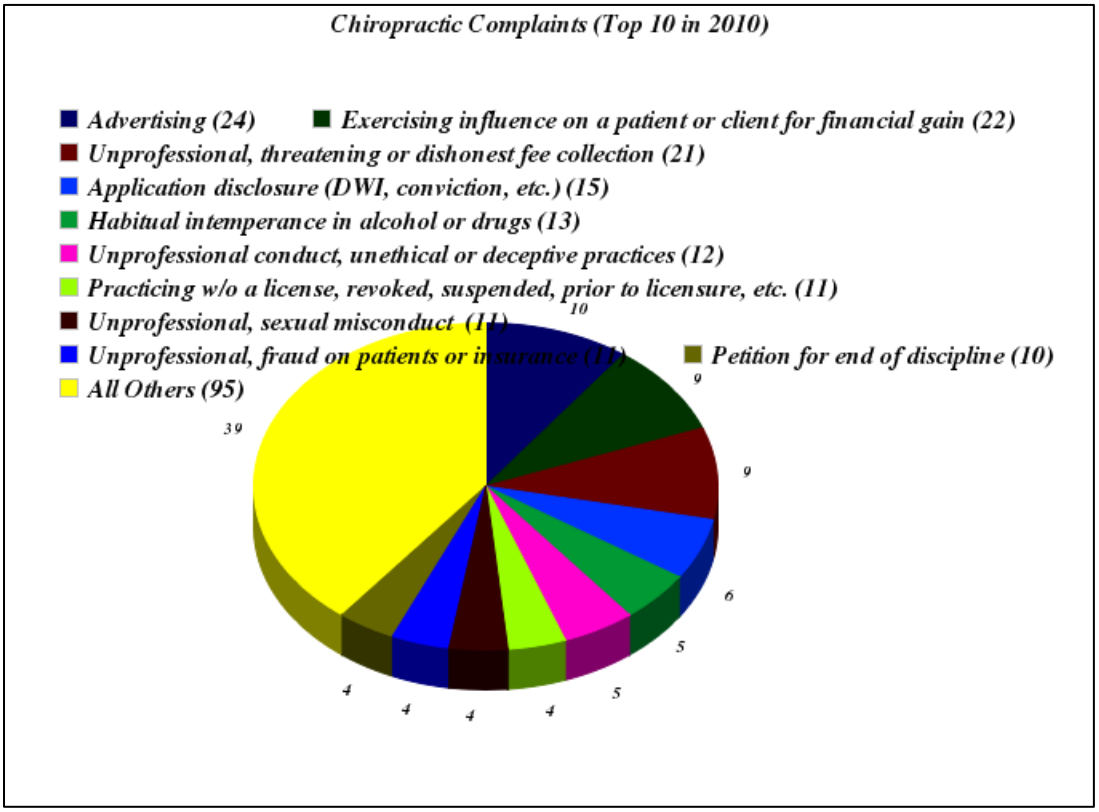
Dr. Smith also provided another important point:

> Chiropractic is growing worldwide, and so is the strength of the regulatory process. Boards are becoming more active, and it's important that chiropractors in practice realize they can't just rely on their own sense that they are practicing appropriately—they need to be aware of the rules and the boundaries that govern the profession, and understand the issues that could potentially get them into trouble.

Id.

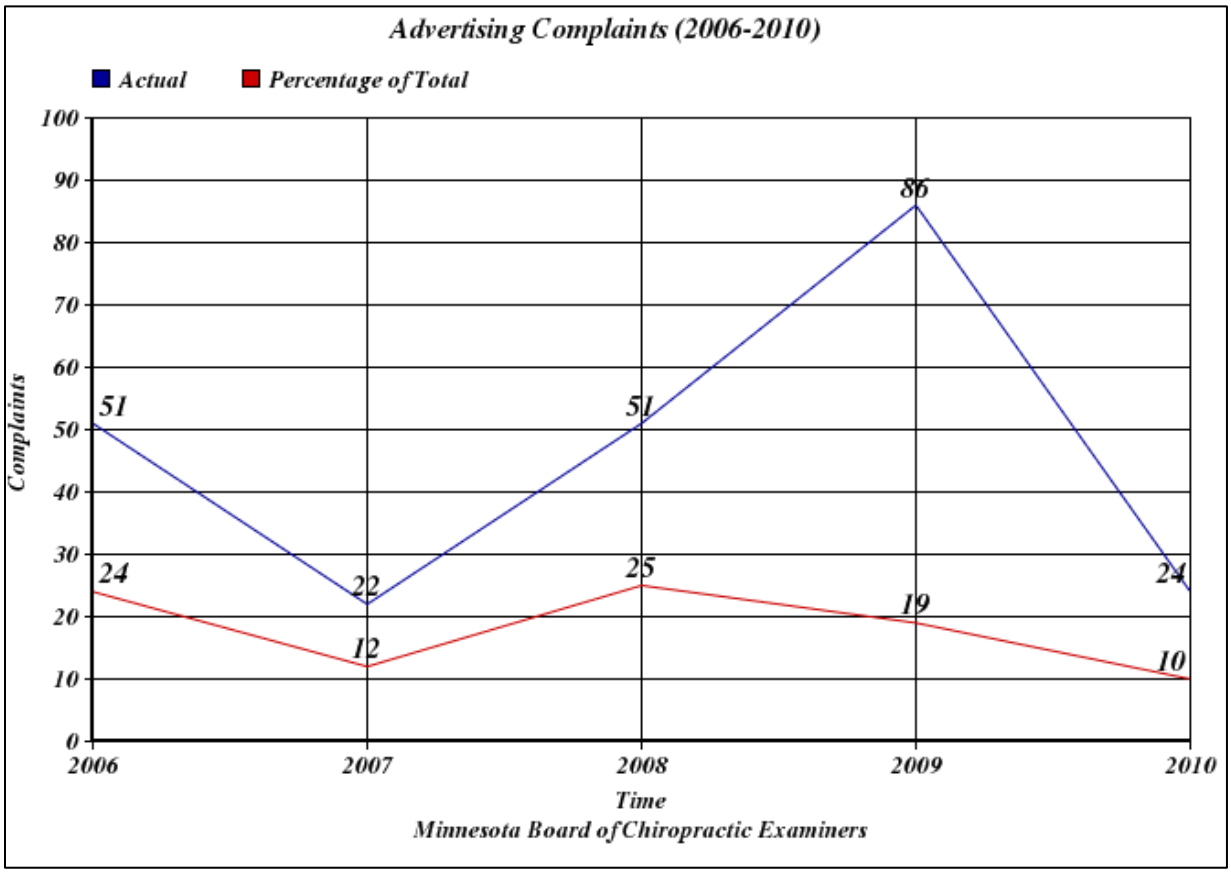
In Minnesota, the top ten violations are: (1) advertising; (2) exercising influence on a patient or client for financial gain; (3) unprofessional, threatening or dishonest fee collection, (4) application non-disclosure (DWI, conviction, etc.); (5) habitual intemperance in alcohol or drugs; (6) unprofessional conduct, unethical or deceptive practices; (7) practicing: without a license, revoked license, suspended license, or prior to licensure, etc.; (8) sexual misconduct; (9) fraud on patients or insurance; and (10) petition for end of discipline. (See the chart below.)

In reviewing the top ten, at least five of them relate to *good record keeping*. Maintaining good patient records will certainly help to avoid (or defend against) ethical complaints regarding your license. Also notably, the other five may not necessarily have anything to do with your direct chiropractor-patient treatment relationship, but this underscores the importance of maintaining your overall practice and general appearance to the public.



ADVERTISING

Common in "unprofessional conduct" complaints are "scope of practice" issues and device manufacturer issues. Shaw, *supra*. Minnesota has a specific complaint category for "advertising." *And "advertising" represents the highest percentage of complaints in Minnesota!*



In recent years, Minnesota has seen an increase in health provider advertising—chiropractors, medical doctors, dentists, etc. And when you are practicing chiropractic and making sure to treat your patients properly, it can be easy to overlook your ethical and legal obligations with respect to advertising. However, Minnesota chiropractors should remember that the Board of Chiropractic examiners can refuse to grant, as well as revoke, suspend, condition, limit, restrict or qualify a chiropractic license for "[a]dvertising that is false or misleading; that

violates a rule of the board; or that claims the cure of any condition or disease." Minn. Stat. § 148.10, subd. 1(a)(1).

Minnesota Rule 2500.0400 prohibits the use of the terms "cure" or "guarantee to cure" or similar terms in advertisements. Those terms are considered *fraudulent and misleading* to the general public. *Id*. Similarly, the rule prohibits untruthful, improbable, misleading or impossible statements in advertising. *Id.*

Minnesota Chiropractic rules also require specific usage of words: advertising ***must*** use the word "chiropractor" or "chiropractic" in (1) the name of the clinic or (2) incorporate it in the body of the advertisement; (a) in written advertisements "chiropractic" must appear in a print size or emphasis equal to the average print/emphasis in the rest of the advertisement; ***and*** (b) in verbal advertisements "chiropractic" must be referred to in a form as audible as the rest of the advertisement. Minn. R. 2500.0510.

In 2012, the No-Fault statutes were amended, changing the rules governing any solicitation or advertisement for medical treatment. *See* Minn. Stat. § 65B.54, subd. 6(d). **It is now unlawful for a medical provider to reference the dollar amount of the potential benefits available under the No-Fault system in a solicitation or advertisement.** *Id*. Although the use of mailers by chiropractors are still permitted (*see* p. 14, *infra*), this new statute means that chiropractors are no longer able to send mailers indicating that an auto-collision victim potentially has up to $20,000.00 in medical and up to $20,000.00 in wage-loss/replacement services benefits available through their No-Fault insurance.

In 1969 the Minnesota Supreme Court heard a case regarding Minnesota Statute § 148.10 (with different language than today, though dealing with "cure" and "guarantee to cure"). *Minn. Academy of Chiropractors, Inc. v. Minn. State Bd. of Chiropractic Examiners*, 169 N.W.2d 26,

27 (Minn. 1969). While this case deals largely with cure and testimonial advertising, what chiropractors should be aware of is that the Board has fairly broad power in regulating—and more importantly—enforcing regulation regarding advertising. *Id.*

Runners

A more recent development in Minnesota law is the prohibition on the use of "runners" in motor vehicle collision cases. In 2004, the Minnesota Supreme Court decided *Pietsch v. Minn. Bd. of Chiropractic Examiners*, 683 N.W.2d 30 (Minn. 2004). *Pietsch* held that the use of runners did not rise to the level of "unprofessional conduct" in Minnesota Statute § 148.10, subd. 1(a)(11) and 1(e). *Id.*

However, since 2008 all "licensed health care providers" have been prohibited from initiating direct contact—in person, by phone, or by other electronic means—with a person injured in a motor vehicle collision "for the purpose of influencing the person to receive treatment" or to purchase a good or item. Minn. Stat. § 65B.54, subd. 6(a). The statute prohibits contact whether by the licensee personally or "by any employee, independent contractor, agent, or third party." *Id.* Chiropractors should note that unlike "unprofessional conduct" under Section 148.10, Section 65B.54, subd. 6(d) specifically provides that a violation (e.g. use of runner, in-person contact, telephone call, etc.) "is grounds for the licensing authority to take disciplinary action against the licensee, *including revocation* in the appropriate cases." (emphasis added).

The law does allow for *written* mailing of advertising literature so long as:

> (1) the word "ADVERTISEMENT" appears clearly and conspicuously at the beginning of the written materials;

> (2) the name of the individual licensee appears clearly and conspicuously within the written materials;
>
> (3) the licensee is clearly identified as a licensed health care provider within the written materials; and
>
> (4) the licensee does not initiate, individually or through any employee, independent contractor, agent, or third party, direct contact with the person after the written materials are sent.

Id. at subd. 6(b). Furthermore, this law ***does not apply*** to: (1) general advertising (public media, general marketing, mailers, etc.); (2) contact with friends/relatives who were injured in a collision; (3) discussing potential treatment with an individual who informs you he/she was hurt in a collision while in social setting; or (4) with a prior patient who you learn was injured in a collision. *Id*. at subd. 6(c). These forms of contact are legally permissible.

Third-Party Advertisements

A significant concern can be repeating the claims of practice management groups or device manufacturers. Gina Shaw, *Avoid Common State Board Violations*, ACA NEWS, Sep. 2010 (*available at* http://www.acatoday.org/content_css. cfm?CID=2791). Chiropractors should remain vigilant about the fact that if *they* repeat something to the patient, the patient hears what the *chiropractor* says to them—not what some third-party, whoever that may be, has said, claimed, written, etc. Use extreme caution in repeating any claims, particularly in light of Rule 2500.0400's prohibition on "cure" or "guarantee to cure."

Additionally, chiropractors cannot "advertise" that they will accept "assigned payments from any third-party payer as payment in full, if the effect is to give the impression of eliminating the need of payment by the patient of any required deductible or co-payment applicable in the patient's health benefit plan." Minn. Stat. § 148.10, subd. (e)(7). "Advertise" here means solicitation by handbills, posters, circulars, motion pictures, radio, newspapers,

television, or any other manner. *Id*. A violation may not only invoke Board action, but also qualifies as a misdemeanor crime. *Id*.

CHIROPRACTIC FEE SPLITTING AND KICKBACKS

Chiropractics cannot "split fees" or promise to pay a portion of a fee or commission or accept rebates. Doing so can result in negative licensing action. Minn. Stat. § 148.10, subd. 1(16). By statute, the Board may refuse to grant or may revoke, suspend, condition, limit, restrict or qualify a chiropractor's license for "[s]plitting fees, or promising to pay a portion of a fee or a commission, or accepting a rebate." *Id*.

The courts in Minnesota have not had any decisions on chiropractic fee splitting, but have summed up the principle in a dental fee splitting case, *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 671 N.W.2d 213 (Minn. Ct. App. 2003) *rev. denied*. (Minn. Jan. 20, 2004). The court articulated the public policy concern with "fee splitting:"

> There is a danger that a doctor, knowing that he had to split his fees with one who did not render medical services, might be hesitant to provide proper services to a patient. Conversely, unneeded treatment might be rendered just because of the need to split fees. In either case, the interests of the patient would be compromised.

Id. at 219 (quoting *E & B Mktg. Enters., Inc. v. Ryan*, 568 N.E.2d 339, 342 (Ill. Ct. App. 1991).[1]

Minnesota Statute § 62J.23 addresses kickbacks and gives the Commissioner of Health and Human Services the power to adopt rules at least as restrictive as federal rules—otherwise, federal law controls.

The Social Security Act provides for criminal penalties for "knowingly and willfully" soliciting or receiving (or offering to pay solicitation or receiving) *any* remuneration (including

[1] In *Alpha* the issue involved dentists who had created the real estate company solely to lease real-estate, etc. Again, this is the dental anti-fee-splitting statute rather than the chiropractic anti-fee-splitting statute. *Compare* Minn. Stat. § 150A.11, subd. 4 *with* Minn. Stat. § 148.10, subd. 1(11), (16).

any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind for referring an individual to a person for services (and other items) under a federal health care program. 42 U.S.C. § 1320a-7b(b). In Minnesota, for like violations, the Commissioner can impose fines on the healthcare provider. Minn. Stat. § 62J.23, subd. 3.

PRIVATE INSURANCE CLAIMS AGAINST PROVIDERS

Regardless of the merit, insurance companies have begun increasingly attacking health care providers—and in particular chiropractors—in defending against No-Fault claims. Frequently this comes in the form of attacks on record keeping, billing, etc. However, insurers have also begun more aggressive campaigns of bringing legal action directly against the provider. In 2013, Farmers Insurance Company and its subsidiaries filed the biggest lawsuit involving No-Fault violations in Minnesota history in federal court against a mobile MRI imaging company and a number of Minnesota chiropractic clinics. The lawsuit was ultimately dismissed by a federal judge, but not without first accomplishing part of Farmers Insurance's intended effect—putting the mobile imaging company out of business.

Illinois Farmers Ins. Co., et al. v. Mobile Diagnostic Imaging, Inc., et al.

On October 14, 2013, Illinois Farmers Insurance Company, 21st Century Insurance Company, and Bristol West Casualty Insurance Company, filed a lawsuit in federal court against Mobile Diagnostic Imaging Incorporated. Also, named in the lawsuit were 46 different Minnesota based chiropractic clinics that had allegedly done business with Mobile Diagnostic and referred patients to its mobile MRI units. The clinics were alleged to have various levels of culpability depending on the extent of the relationship with mobile imaging company. In the lawsuit Farmers Insurance sought recovery of $1.9 million in damages. Farmers Insurance

alleged that many of the services performed by the mobile imaging company were performed fraudulently and without justification.

Farmers Insurance further alleged that the clinics were paid improper "leasing charges" by the mobile imaging company to permit it to park its mobile imaging units at the clinics' parking lots and use the space while imaging the clinics' patients. Farmers Insurance argued that some of the clinics did not technically own the parking lot space that they were leasing to the mobile imaging company and therefore did not have a right to collect "leasing charges." Farmers Insurance claimed that the amount paid for the "leasing charges" were also much more than what would be legally permissible and in actuality that these "leasing charges" were used in an attempt to hide illegal kickbacks/referral fee splitting between the mobile imaging company and the clinics.

Among the counts Farmers Insurance alleged in the complaint were:

> (1) violation of the federal Racketeer Influenced and Corrupt Organizations Act (RICO); (2) violation of the corporate practice of medicine doctrine; (3) consumer fraud; (4) no-fault fraud; (5) common law fraud; (6) fraudulent concealment; (7) conspiracy to commit crimes; (8) unjust enrichment; (9) failure to document referrals; and (10) violations of federal and state anti-kickback statutes (among others).

The lawsuit also brought investigations by the Minnesota Board of Chiropractic Examiners against the chiropractic clinics that were named. Many of the chiropractic clinics worked to negotiate agreements of corrective action with the Board, which included admissions that Minnesota laws were violated. A number of the clinics also negotiated individual settlements with Farmers Insurance to avoid further litigation expenses. Other chiropractic clinics alleged that the lawsuit was baseless against them and that they had not received improper leasing charges or kickbacks.

On August 19, 2014, federal judge Patrick Schiltz dismissed the case against the mobile imaging company. In his order, Judge Schiltz ultimately held that there was not enough evidence that the MRI imaging tests were medically unnecessary. Judge Schiltz stated that Farmers Insurance would have been obligated to pay for the MRI scans if the amounts charged were reasonable and if the tests were medically necessary. Judge Schiltz found that Farmers Insurance had overreached in its complaint by claiming that not one of the scans performed by the mobile imaging company had been legitimate. Regardless of the case being dismissed, the mobile imaging company closed after the lawsuit was initiated.

RECORD KEEPING REDUX

It should go without saying that record keeping is important. However: **RECORD KEEPING IS IMPORTANT!!!!**

Record keeping is vital to you and to your patient. As we bring the attorneys' perspective to this matter, we cannot overstate the nature of good records in No-Fault arbitrations and in lawsuits against at-fault parties. Records need to substantiate the billing statements, explain the care provided and indicate what is wrong with the patient. The full requirements are listed in Minnesota Statute § 148.107 and in our other handout.

As of late, more defense-attorneys are raising poor record keeping as a basis for denial of No-Fault claims. Or, they are grilling claimants during cross-examinations based on poorly documented or poorly clarified complaints. One repeated issue we encounter is poorly documented referrals—or a complete lack of documentation. This could be the failure to document the referral altogether or failure to document the symptoms and basis for the referral.

As such, in order for your patient's bills to get paid, *you*, the treating chiropractor, *must* maintain good records.

Remember, the Board can use "improper management of health records" as a basis to take negative licensing action, including revocation. Minn. Stat. § 148.10, subd. 1(14). This could mean even storing them properly. Similarly, the Board can take negative licensing action, including revocation, for

> Failing to keep written chiropractic records justifying the course of treatment of the patient, including, but not limited to, patient histories, examination results, test results, and x-rays. Unless otherwise required by law, written records need not be retained for more than seven years and x-rays need not be retained for more than four years.

Id. at subd. 1(18).

Record keeping is also more essential than ever. Not only do you need good notes so your patient has a good file that documents the history, injury, treatment, etc., but as described above, insurers are increasingly attacking providers for their records.

As of late, we have encountered (and the argument is growing in popularity amongst defense attorneys) the "CPT coding argument." For example, defense attorney presented materials regarding CPT coding and argued that the provider can only charge for one modality to one part of the body (i.e. that a chiropractor could only charge for adjustment to the neck, but not EMS to the neck in the same visit). For example, CPT Code 98941 is for a 3-4 level spinal adjustment. CPT Code 97012 is for "[a]pplication of a modality to 1 or more areas; traction, mechanical." CPT Code 97112 is "[t]herapeutic procedure, 1 or more areas, each 15 minutes; neuromuscular reeducation of movement, balance, coordination, kinesthetic sense, posture, and/or proprioception for sitting and/or standing activities." The argument is that the chiropractor cannot bill for both the adjustment and the traction.

Logically, this argument should not carry any weight and does not seem to have any support in the materials submitted by defense attorneys. These are clearly distinct procedures. This argument is easier for a patient's attorney to attack, but it already has the arbitrator thinking about something other than the real issues. Furthermore, these arguments develop real merit with arbitrators when there are poor record keeping, poor billing practices, and poor explanations to your patient. It becomes an uphill battle to convince the arbitrator that the modalities were performed. If the records do not clearly indicate a treatment procedure that was billed for work actually performed, it gives the arbitrator easy justification for deny payment of that treatment procedure. Ultimately, make sure that you keep good records of the work you are performing on your patients.

RULES & STATUTES

Minnesota Statute § 148.10. Licenses revoked; new licenses

Subdivision 1. Grounds. (a) The state Board of Chiropractic Examiners may refuse to grant, or may revoke, suspend, condition, limit, restrict or qualify a license to practice chiropractic, or may cause the name of a person licensed to be removed from the records in the office of the court administrator of the district court for:

> (1) Advertising that is false or misleading; that violates a rule of the board; or that claims the cure of any condition or disease.
>
> (11) unprofessional conduct.
>
> (14) Improper management of health records, including failure to maintain adequate health records as described in clause (18), to comply with a patient's request made under sections 144.291 to 144.298 or to furnish a health record or report required by law.
>
> (16) Splitting fees, or promising to pay a portion of a fee or a commission, or accepting a rebate.
>
> (18) Failing to keep written chiropractic records justifying the course of treatment of the patient, including, but not limited to, patient histories, examination results, test results, and x-rays. Unless otherwise required by law, written records need not be retained for more than seven years and x-rays need not be retained for more than four years.

(e) For the purposes of paragraph (a), clause (11), unprofessional conduct means any unethical, deceptive or deleterious conduct or practice harmful to the public, any departure from or the failure to conform to the minimal standards of acceptable chiropractic practice, or a willful or careless disregard for the health, welfare or safety of

patients, in any of which cases proof of actual injury need not be established. Unprofessional conduct shall include, but not be limited to, the following acts of a chiropractor:

> (7) advertising that the licensee will accept for services rendered assigned payments from any third-party payer as payment in full, if the effect is to give the impression of eliminating the need of payment by the patient of any required deductible or co-payment applicable in the patient's health benefit plan. As used in this clause, "advertise" means solicitation by the licensee by means of handbills, posters, circulars, motion pictures, radio, newspapers, television, or in any other manner. In addition to the board's power to punish for violations of this clause, violation of this clause is also a misdemeanor;

Minnesota Rule 2500.0400 PROHIBITED ADVERTISEMENTS.

The terms "cure" or "guarantee to cure" or similar terms in advertisements are fraudulent and misleading to the general public.

The advertising by any means of chiropractic practice or treatment or advice in which untruthful, improbable, misleading, or impossible statements are made is prohibited.

Minnesota Rule 2500.0510 ADVERTISING.

All advertising must use the word "chiropractor" or "chiropractic" in the name of the clinic or incorporate it into the body of the advertisement as follows:

A. all written advertisements must make the chiropractic reference in a print size or emphasis equal to the average print size or emphasis utilized in the rest of the advertisement; and

B. all verbal advertisements must make the chiropractic reference in a form as audible as the rest of the advertisement.

Minnesota Statute § 65B.54. Claims practices

Subdivision 6. Unethical practices. (a) A licensed health care provider shall not initiate direct contact, in person, over the telephone, or by other electronic means, with any person who has suffered an injury arising out of the maintenance or use of an automobile, for the purpose of influencing that person to receive treatment or to purchase any good or item from the licensee or anyone associated with the licensee. This subdivision prohibits such direct contact whether initiated by the licensee individually or on behalf of the licensee by any employee, independent contractor, agent, or third party, including a capper, runner, or steerer, as defined in section 609.612, subdivision 1, paragraph (c). This subdivision does not apply when an injured person voluntarily initiates contact with a licensee.

(b) This subdivision does not prohibit licensees, or persons acting on their behalf, from mailing advertising literature directly to such persons, so long as:

> (1) the word "ADVERTISEMENT" appears clearly and conspicuously at the beginning of the written materials;
>
> (2) the name of the individual licensee appears clearly and conspicuously within the written materials;
>
> (3) the licensee is clearly identified as a licensed health care provider within the written materials; and
>
> (4) the licensee does not initiate, individually or through any employee, independent contractor, agent, or third party, direct contact with the person after the written materials are sent.

(c) This subdivision does not apply to:

(1) advertising that does not involve direct contact with specific prospective patients, in public media such as telephone directories, professional directories, ads in newspapers and other periodicals, radio or television ads, Web sites, billboards, mailed or electronically transmitted communication, or similar media if such advertisements comply with paragraph (d);

(2) general marketing practices, other than those described in clause (1), such as giving lectures; participating in special events, trade shows, or meetings of organizations; or making presentations relative to the benefits of a specific medical treatment;

(3) contact with friends or relatives, or statements made in a social setting;

(4) direct contact initiated by an ambulance service licensed under chapter 144E, a medical response unit registered under section 144E.275, or by the emergency department of a hospital licensed under chapter 144, for the purpose of rendering emergency care; or

(5) a situation in which the injured person:

(i) had a prior professional relationship with the licensee;

(ii) has selected that licensee as the licensee from whom the injured person receives health care; or

(iii) has received treatment related to the accident from the licensee.

(d) For purposes of this paragraph, "legal name," for an individual means the name under which an individual is licensed or registered as a health care professional in Minnesota or an adjacent state, and for a business entity, a name under which the entity is registered with the secretary of state in Minnesota or an adjacent state, so long as the name does not include any misleading description of the nature of its health care practice, and "health care provider" means an individual or business entity that provides medical treatment of an injury eligible as a medical expense claim under this chapter. In addition to any laws governing, or rules adopted by, a health care provider licensing board, any solicitation or advertisement for medical treatment, or for referral for medical treatment,, of an injury eligible for treatment under this chapter must: (1) be undertaken only by or at the direction of a health care provider; (2) prominently display or reference the legal name of the health care provider; (3) display or reference the license type of the health care provider, or in the case of a health care provider that is a business entity, the license type of all of the owners of the health care provider but need not include the names of the owners; (4) not contain any false, deceptive, or misleading information, or misrepresent the services to be provided; **(5) not include any reference to the dollar amounts of the potential benefits under this chapter**; and (6) not imply endorsement by any law enforcement personnel or agency.

(e) A violation of this subdivision is grounds for the licensing authority to take disciplinary action against the licensee, including revocation in appropriate cases.

Minnesota Statute § 148.10. Licenses revoked; new licenses

Subdivision 1. **Grounds.** (a) The state Board of Chiropractic Examiners may refuse to grant, or may revoke, suspend, condition, limit, restrict or qualify a license to practice chiropractic, or may cause the name of a person licensed to be removed from the records in the office of the court administrator of the district court for:

(11) Unprofessional conduct.

(16) Splitting fees, or promising to pay a portion of a fee or a commission, or accepting a rebate.

Minnesota Statute § 62J.23. Provider conflicts of interest

Subdivision 1. **Rules prohibiting conflicts of interest.** The commissioner of health shall adopt rules restricting financial relationships or payment arrangements involving health care providers under which a person benefits financially by referring a patient to another person, recommending another person, or furnishing or recommending an item or service. The rules must be compatible with, and no less restrictive than, the federal Medicare antikickback statute, in section 1128B(b) of the Social Security Act, United States Code, title 42, section 1320a-7b(b), and regulations adopted under it. However, the commissioner's rules may be more restrictive than the federal law and regulations and may apply to additional provider groups and business and professional arrangements. When the state rules restrict an arrangement or relationship that is permissible under federal laws and regulations, including an arrangement or relationship expressly permitted under the federal safe harbor regulations, the fact that the state requirement is more restrictive than federal requirements must be clearly stated in the rule.

Subd. 2. **Restrictions.** (a) From July 1, 1992, until rules are adopted by the commissioner under this section, the restrictions in the federal Medicare antikickback statutes in section 1128B(b) of the Social Security Act, United States Code, title 42, section 1320a-7b(b), and rules adopted under the federal statutes, apply to all persons in the state, regardless of whether the person participates in any state health care program.

Subd. 3. **Penalty.** The commissioner may assess a fine against a person who violates this section. The amount of the fine is $1,000 or 110 percent of the estimated financial benefit that the person realized as a result of the prohibited financial arrangement or payment relationship, whichever is greater. A person who is in compliance with a transition plan approved by the commissioner under subdivision 2, or who is making a good faith effort to obtain the commissioner's approval of a transition plan, is not in violation of this section.

42 USC § 1320a–7b. Criminal penalties for acts involving Federal health care programs

(b) **Illegal remunerations**

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

> (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or
>
> (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

> (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or
>
> (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(3) [Exemptions omitted.]